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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 746.

J. T. STOKES ET AL., PLAINTIFFS IN ERROR,

vs.

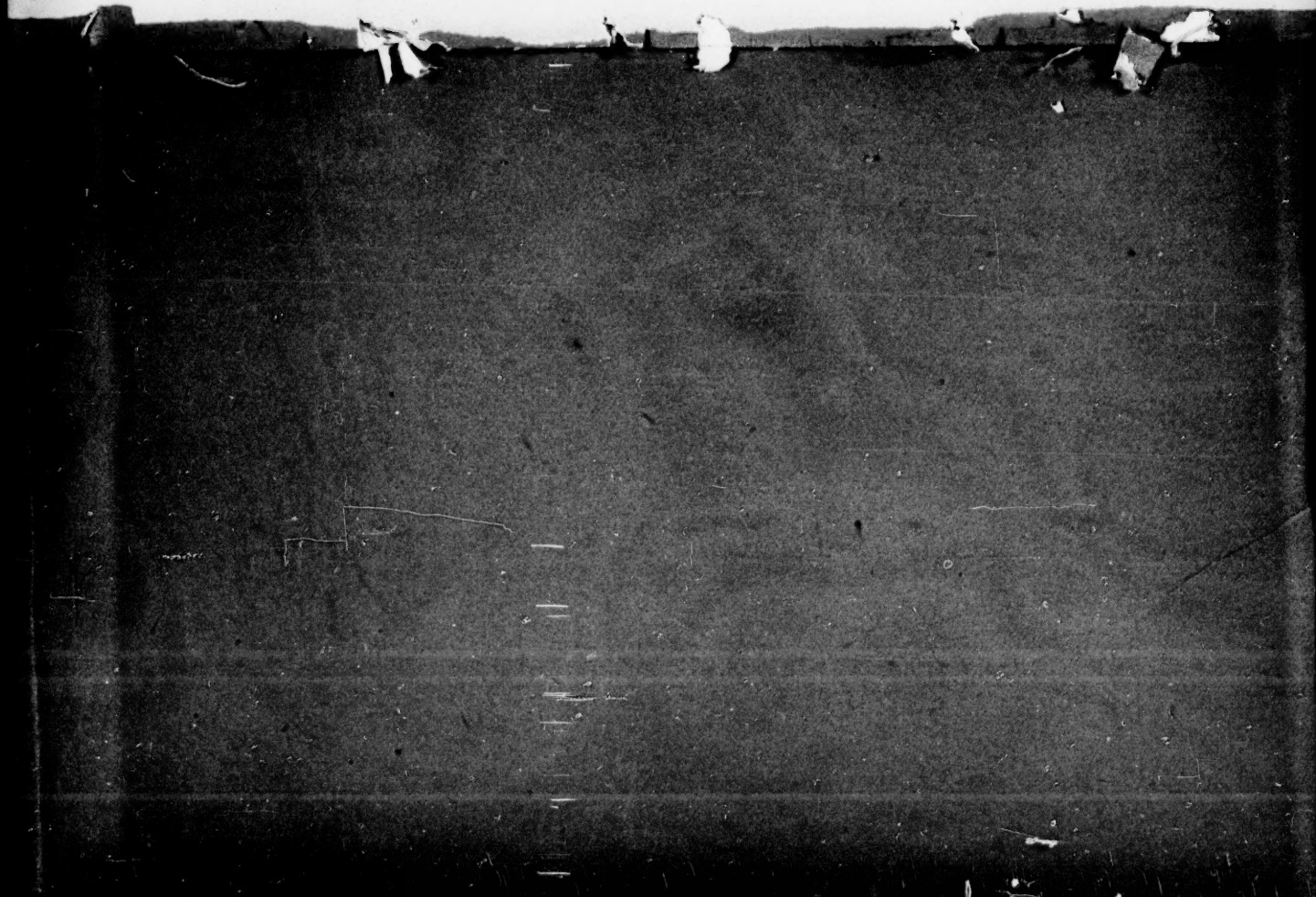
THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

JOHN D. BURNETT,
Counsel for Plaintiffs in Error.

JUDD & DETWEILER PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

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J. T. STOKES ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Brief of John D. Burnett, Counsel for Plaintiffs in Error in the Above-entitled Cause.

FIRST.

An Abstract or Statement of the Case.

The plaintiffs in error were charged under section 5440, Revised Statutes, with the offense of conspiracy, and an indictment was returned against them by the grand jury of the district court for the southern district of Alabama, at the May term, 1893, of said court. (See Record, pages 1 to 21, inclusive.) To this indictment the plaintiffs in error filed a demurrer. (See Record, page 22.) This demurrer was overruled by the court. (See Record, page 23.) To the

overruling of their demurrer the plaintiffs in error reserved an exception. (See Record, "bill of exceptions," page 25.)

During the trial of the cause the plaintiffs in error reserved several exceptions to the ruling of the court in allowing certain letters and papers to be introduced in evidence, and also excepted to a portion of the argument made to the jury by the United States district attorney. (See bill of exceptions, Record, pages 25 to 30, inclusive.) The plaintiffs in error were convicted in the court below, and the jury assessed a fine of $100 against each of them. Before sentence the plaintiffs in error made a motion in arrest of judgment. (See Record, page 24.) The court below overruled this motion (Record, page 24.) The action of the court below in overruling the demurrer, allowing the letters and papers to be introduced in evidence, allowing the United States attorney to make the argument to the jury, to which plaintiffs in error objected, and overruling the motion in arrest of judgment were erroneous and are the questions raised and involved for the consideration of this honorable court.

SECOND.

Specification of Errors.

1st. The court erred in overruling the demurrer of plaintiffs in error to the indictment.

2d. The court erred in allowing the witness W. C. Karns to testify before the jury that "in accordance with his instructions, on the 7th day of January, 1892, he went on the postal car at Garland, Alabama, and made an examination of the mails, and in the mail on said car he found a letter or an envelope addressed to Danzinger Bros., Syracuse, N. Y., with the words written and printed on said envelope, 'Return in 10 days to J. T. Stokes, dealer in general merchandise, Olivia, Ala.;'" and also an en-

velope addressed to Dexter Shoe Company, Brockton, Mass., 122 Summers street, with the words printed on the same, "If not called for in 10 days return to J. Pinkerton & Co., dealers in general merchandise, Olivia, Ala.;" also an envelope addressed Schaltman Bros., New York, with words printed on the same, "If not delivered in 10 days return to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed S. Caskel, Esq., New York, with words printed on the same, "Return in 10 days to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed H. H. Gray's Sons, Syracuse, New York, with words printed on same, "Return to A. J. Kendrick, Olivia, Ala., if not delivered in ten days;" also an envelope addressed G. E. Zeltmacher & Co., 54 and 56 Duane street, New York, with words printed on same, "Return to A. J. Kendrick, Olivia, Ala., if not delivered in ten days;" also an envelope addressed Havenrick, Tronstine & Co., 687 and 689 Broadway, New York, with the words printed on the same, "Return in 10 days to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed Mr. Max Ernst, 626 Broadway, New York, with the words printed on the same, "Return in 10 days to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed A. and J. Levy, clothing, 625 Broadway, New York, with the words printed on the same, "Return in 10 days to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed J. Y. Gallager, New York, 556 Broadway, with the words printed on same, "Return in 10 days to A. J. Kendrick, dealer in general merchandise, Olivia, Ala.;" also an envelope addressed Lusting Bros., 59 Bleeker street, New York, with the words printed on the same, "Return to A. J. Kendrick, Olivia, Ala., if not delivered in 10 days;" that all of the said envelopes contained something, and had on them postage stamps, and each of the same had on the post-office stamp as follows, to wit, "Olivia, Jan. 7, 1892; Ala." Witness did not know the contents of any of the

envelopes, but that he put his private mark on all of them and allowed them to go on in the mail to the parties to whom they were addressed, with the request that the same, with their contents, be returned to him, and soon afterward he received the same through the mails, &c.; and the court erred in allowing each of said envelopes, with the printing and writing and endorsements thereon, separately to be introduced in evidence. (See Record, pages 25, 26, and 27.)

3d. The court erred in allowing the order signed T. B. Brown, with the following papers attached thereto, to wit, a receipt to the Louisville and Nashville Railroad Company for a box of merchandise in the name of T. B. Brown, signed by E. H. Cook, Garland, Alabama; a bill of lading from the Piedmont air line showing that W. L. Douglas had shipped a case of merchandise to T. B. Brown, Greenville, Alabama; a local freight way bill, Montgomery, Alabama, to Greenville, Alabama, one case of merchandise consigned to T. B. Brown; a local freight way bill, Greenville, Alabama, to Garland, Alabama, one box of merchandise consigned to E. H. Cook & Co., to be introduced in evidence. (See Record, pages 27 and 28.)

4th. The court erred in allowing the credit statement signed A. J. Kendrick to be introduced in evidence. (See Record, pages 28, 29, and 30.)

5th. The court erred in allowing the United States attorney to state in his argument to the jury, "To take the letters offered in evidence signed A. J. Kendrick and the credit statement signed A. J. Kendrick, when they retired to make up their verdict, and compare the two and say whether one and the same man wrote both papers." (See Record, page 30.)

6th. The court erred in overruling the motion of plaintiffs in error in arrest of judgment. (See Record, page 24.)

7th. The court erred in its final judgment, made July 12, 1893. (See Record, page 25.)

8th. And the said J. T. Stokes *et al.*, the plaintiffs in error, respectfully pray this honorable Court to correct such manifest errors as have intervened in the court below to their prejudice and injury and to reverse said cause.

THIRD.

Argument.

The indictment is defective. To make out the offense denounced by section 5480 of the Revised Statutes of the United States, as amended by act of Congress of March 2, 1889, three matters of fact must be charged in the indictment and established by proof: (1) that a scheme or artifice to defraud has been devised by the persons charged; (2) that scheme or artifice to defraud was to be effected by correspondence with another person by means of the post-office establishment of the United States, or by inciting such other person to open such communication with the persons charged; (3) that for the purpose of executing such a scheme or artifice or attempting so to do, the persons charged placed a letter or packet in a post office of the United States or has taken or received a letter or packet therefrom. (Gould & Tucker's Notes on Revised Statutes of the United States, page 1034; United States *vs.* Wootten, 29 Fed. Rep., 702.)

When this particularity and certainty is required in an indictment for the offense made a crime by this statute, the same definiteness and certainty should be observed and required by the pleader in drawing an indictment charging the offense of "conspiracy" to commit the act made a crime by section 5480.

All material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. (United States *vs.* Hess, 124 U. S., 483.)

The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. (Evans *vs.* United States, 153 U. S., 584.)

The indictment in charging the conspiracy or the agreement of the plaintiffs in error to commit the unlawful act, after giving the names of the plaintiffs in error, is in the following words, to wit:

"On the first day of May, eighteen hundred and ninety-three, and before the finding of this indictment, and within the said southern district of Alabama, and within the jurisdiction of this court, did then and there conspire, combine, confederate, and agree together to commit the act made an offense and crime by section 5480 of the Revised Statutes of the United States, as amended by act of Congress March 2d, 1889—that is to say, the said defendants conspired, combined, confederated, and agreed together in devising and intending to devise a scheme and artifice to defraud various persons, firms, and companies out of their property, goods, and chattels, and particularly to defraud Bion F. Reynolds and W. L. Douglas Shoe Company of Brockton, Massachusetts; E. B. Bowen, Evans & Company, B. C. Young & Company, Dexter Shoe Company, and Sage & Company, Boston, Massachusetts; L. C. Lull & Company, Kalamazoo, Michigan; W. F. Main & Company, Iowa City, Iowa; Heywood Boot & Shoe Company, Worcester, Massachusetts; Schaltman Bros., New York city, New York; W. F. Vandiver & Company, Montgomery, Alabama; James McPhillips, Mobile Stationery Company, and W. B. Vail, Mobile, Alabama, and other persons, firms, and companies to the grand jurors unknown, of their property, goods, and chattels."

This is all of the agreement showing there was a conspiracy or an unlawful agreement constituting a conspiracy that is alleged in the indictment. Does this constitute a conspiracy? No agreement by the plaintiffs in error to use the mails or post-office establishment of the United States is set out in the conspiracy part of the indictment, which is quoted in full, as above set out, and no crime against the

laws of the United States is charged. The balance of the indictment not quoted charges only the means by which a conspiracy was to be effected and the overt acts committed. For the conspiracy part of the indictment see Record, page 1 down to the first period on page 1; and as to the means and overt acts see balance of indictment from first period on page 1 of record to page 21, inclusive.

An indictment under the Federal statute which fails to state with certainty the acts relied on effecting the conspiracy is defective. (American and English Encyclopedia of Law, vol. 4, page 595.)

The offence must be clearly and sufficiently charged, and, as charged in the indictment, cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. (U. S. *vs.* Britton, 108 U. S., 199; U. S. *vs.* Milner *et al.*, 36 Federal Reporter, 890).

It is insisted that the indictment contains no charge of conspiracy, and that it plainly appears from the record that the defect in the indictment in not sufficiently charging the unlawful agreement by plaintiffs in error to do some act made a crime by the United States statutes is attempted to be supplied by the other portions of the indictment, charging the means by which the conspiracy was to be effected and the overt acts done in pursuance thereof.

When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means, the means must be set out. (Pettibone *vs.* United States, 148 U. S., 197.)

Tested by the rules as laid down in the above authorities, the indictment is defective, because it fails to charge the facts which constitute the offense, and the demurrer and motion in arrest of judgment made by plaintiffs in error

ought to have been sustained by the court below. (See demurrer, Record, page 22, and motion in arrest of judgment, Record, page 24.)

It was greatly to the injury and prejudice of the plaintiffs in error for the court below to allow the envelopes, with the printing, writing, and indorsements thereon, to be introduced in evidence. (See Record, pages 25, 26, and 27, and second assignment of error, Record, page 31.)

To authorize the introduction of these envelopes, with the printing, writing, and indorsements, and to make them competent as evidence, the Government ought to have shown that the plaintiffs in error or some one of them wrote or had written these papers, or the handwriting should have been proven to be that of the plaintiffs in error or some one of them on each of said papers, so as to show that each of them was genuine and emanated from the plaintiffs in error or from some one of them. The plaintiffs in error reserved an exception separately to the introduction of each of said papers, and there was no proof of the genuineness of these papers. "In general, all private writings produced in evidence must be proved to be genuine." (1st Greenleaf, vol. 1, section 557.)

The court erred in permitting the order signed T. B. Brown and the way bills made by the railroads to be introduced in evidence against the plaintiffs in error. These papers are irrelevant, and nowhere are they named in the indictment, and if competent for any purpose as evidence the plaintiffs in error were taken by surprise, as the pleader in drawing the indictment failed to say anything about them, and for this reason they should not have been allowed to be introduced. (See third assignment of Error, Record, page 31, and bill of exceptions, Record, pages 27 and 28.)

The fourth assignment of error is in allowing the credit statement dated January 17, 1891, signed A. J. Kendrick, to go to the jury as evidence (Record, page 31; bill of ex-

ceptions, Record, pages 28, 29, and 30). This paper purports to have been made by A. J. Kendrick, one of the plaintiffs in error, giving the financial standing of himself (A. J. Kendrick), and therefore could not have been made a "fact in issue" under the indictment as framed. In the portion of the indictment charging the agreement which constitutes the conspiracy "credit statements" made by the plaintiffs in error were not contemplated or agreed upon, and in that portion of the indictment which charges the means by which the conspiracy was to be effected we find the following, to wit:

"And the said defendants were mutually to represent each other to the said persons, firms and companies, and others unknown to the grand jurors, intended to be defrauded as aforesaid, as financially responsible and entitled to receive various kinds of merchandise and goods on credit." (Record, page 1, after first period.)

This allegation is the only one contained in the indictment that bears the remotest reference even to "credit statements." And what do we find in the allegation above set out? That they were to mutually represent each other as financially responsible, not that each or any one of them was to represent himself as being financially responsible, as the credit statement purporting to be made by A. J. Kendrick represents himself (A. J. Kendrick) as being financially responsible; and it was greatly to the injury and prejudice of the plaintiffs in error that the court below, against their objection, allowed the United States attorney to state to the jury in his argument, "To take the letters offered in evidence signed A. J. Kendrick and the credit statement signed A. J. Kendrick, when they retired to make up their verdict, and compare the two and say whether one and the same man wrote both papers," the said A. J. Kendrick having denied that he wrote or had written the said credit statement, and there was no proof to the contrary. (See Record,

bill of exceptions, pages 28, 29, and 30, and fifth assignment of error, page 31.)

There is no educational qualification of jurors fixed by the law, and such an argument by the United States attorney presupposed that all of the jury could read and write, and we respectfully submit that if each one of the jurors could not read and write, the juror who could neither read nor write necessarily would have to be guided in forming his opinion of the handwriting of two papers in evidence by the opinion of some juror on the panel with him who could read and write. Aside from this, the "credit statement" was irrelevant, and irrelevant papers are inadmissible for the sole purpose of comparison. (American and English Encyclopedia of Law, vol. 9, pages 288 and 289.)

The plaintiffs in error insist that there is manifest error in the action of the court below in overruling their demurrer to the indictment and overruling their motion in arrest of judgment and in allowing the envelopes, letters, and papers to be introduced in evidence, and in allowing the United States attorney to make the argument to the jury heretofore mentioned, and that the judgment of the district court of the United States for the southern district of Alabama in this cause should be reversed.

All of which is respectfully submitted.

JOHN D. BURNETT,
Counsel for Plaintiffs in Error.

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BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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THE UNITED STATES.
No. 746.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE UNITED STATES.

Plaintiffs in error were convicted in June, 1893, in the district court of the United States for the southern district of Alabama, on an indictment charging them with conspiracy to defraud certain persons who are named in the indictment, through the means of the post-office establishment of the United States, in violation of section 5440 Revised Statutes.

ASSIGNMENT OF ERRORS.

I.

In overruling the demurrer to the indictment. The grounds of demurrer are stated on page 22, and are seven in number.

1. The indictment is vague, indefinite, and uncertain in this, that the agreement showing the conspiracy is not set out sufficiently.

The indictment charges that defendants did on the 1st day of May, 1893, conspire and agree together to defraud various firms and companies out of their goods and chattels by devising and intending to devise a scheme and artifice to so defraud them.

> The scheme and artifice to defraud as aforesaid was to be carried out by each of said defendants representing himself to be engaged as a dealer in various kinds of merchandise and goods, and to have an office, and to use in his correspondence sheets of paper, with his pretended business printed thereon. And the said defendants were to mutually represent each other to the said persons, firms, and companies * * * intended to be defrauded as aforesaid, as financially responsible and entitled to receive various kinds of merchandise and goods on credit; and the said scheme and artifice to defraud as aforesaid was to be further effected by ordering merchandise and goods from the persons, firms, and companies as aforesaid * * * having no intention, then and there, to pay for such merchandise and goods so ordered as aforesaid, but to convert the said goods and merchandise to the use of each and of each other; that the post-office establishment of the United States was to be used for the purpose of executing said scheme and artifice to defraud, as aforesaid, pursuant to said conspiracy, by opening correspondence with the said persons, firms, and companies * * * and by inciting said persons, firms, and companies * * * to open correspondence with the said defendants by means of the post-office establishment of the United States.

And that for the further purpose of executing said conspiracy to defraud, as aforesaid, the said J. T. Stokes did wrongfully and unlawfully deposit in a certain post-office of the United States, to wit, the post-office at Olivia, Conecuh County, Ala., on or about the 30th day of November, 1891, a letter addressed to Bion F. Reynolds, Brockton, Mass., which said letter was substantially in words and figures as follows, to wit: * * * And which said letter was then and there inclosed in a sealed envelope, deposited in the post-office of Olivia, as aforesaid, to be conveyed by the post-office establishment of the United States to the said Bion F. Reynolds. And the said letter contained a check on Morris & Co., bankers, Montgomery, Ala., for $8.80, payable to the order of said Reynolds; and the amount of the said check was equal in amount to the merchandise and goods ordered by the said Stokes in said letter from the said Reynolds. The said Stokes had no money on deposit with the said Morris & Co., bankers, as aforesaid, when he drew and inclosed said check, nor had he funds deposited with the said bankers at any time. But the sending of the said check was pursuant to the conspiracy aforesaid, a scheme and artifice to defraud the said Bion F. Reynolds of his goods and merchandise by not paying and intending then and there not to pay for the merchandise so ordered, but convert the same to the use of the said J. T. Stokes, and other defendants named, as aforesaid.

And then follows from the third to twenty-first page, inclusive, other instances of the means employed by the defendants to carry their conspiracy into execution.

There is nothing vague, indefinite, or uncertain in the language in which the agreement of the conspirators is set out.

To establish a conspiracy it is not necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. (*United States* v. *Babcock*, 3 Cent. Law J., 144; *United States* v. *Nunnemacher*, 7 Biss., 122.)

> The acts of the parties, the nature of those acts, with the accompanying circumstances, the character of the transactions, as the evidence may disclose them, should be considered and are sometimes the only sources from which to derive the evidence of an agreement, which may be express or implied to do the act which the law condemns. (*United States* v. *Kane*, 23 F. R., 748.)

In *United States* v. *Hoeflinger* (33 F. R., 1469) the demurrer to an indictment charging the offense here charged was placed on the ground that the letter deposited in the mail was not set out *in hæc verba* in the indictment.

In overruling the demurrer and sustaining the indictment the court said:

> The offense described in the indictment consists in placing a letter in the mail in execution of a fraudulent scheme, previously devised, which is intended to be carried out through the agency of the post-office establishment. It is not essential that the letter written in aid of the scheme shall contain false statements. * * * The important question is, whether a fraudulent scheme was concocted of the nature described in the indictment, and whether the letter in question was mailed in furtherance of that scheme. (See, too, *United States* v. *Wootten*, 29 F.

R., 702; *United States* v. *Martin*, 28 F. R., 812; *In re Haynes*, 30 F. R., 767; *United States* v. *Hess*, 124 U. S., 486; *United States* v. *Barrett*, 65 Fed. R., 62.)

The indictment here charges (1) that the persons named in the indictment did conspire together and enter into an unlawful agreement and combination; (2) that the means by which their unlawful purpose was carried into effect was through the post-office establishment of the United States; (3) that one or more of said parties to said conspiracy did some act to effect the object of said unlawful combination and agreement; (4) it sets out specifically the times, places, instruments, manner and means, purposes and objects of the agreement and of its execution.

2. That the indictment does not charge "the giving of checks as part of the agreement of which the conspiracy was based."

It is not necessary to the adequate and complete charge of the crime of conspiracy that all of the means and instruments by which the conspiracy is to be carried out shall be recited or charged in detail. "The giving of checks" may be an element of the proof relied on to establish the charge of conspiracy—to prove the agreement among the confederates. But it would not be necessary here, as it would not in any criminal case, to set out in the indictment the evidence relied on to support the charge. It is, however, specifically charged as a fact, in each of the transactions recited in the indictment, that checks were given by the defendants, or some of them, to effectuate the criminal agreement.

3. That by some clerical or typographical blunder, M has been substituted for R, or R for M, as the initial letter in the middle name of Mr. Jones, can hardly afford sufficient ground to support an objection to the indictment.

It does appear, page 3, in one of the letters written by J. T. Stokes to L. C. Lull Co., that he refers to "T. m. Jons, Olivia, Ala.," and the same initial is preserved in the description of that transaction, as stated in the indictment.

It is enough that Jones, the defendant, is charged by his right name in the charging part of this indictment. If there was error at all in referring to Jones by the initial M, used in Stokes's letter, it was an error which could only have been availed of by an objection to the testimony when offered, or by motion to reject it when admitted.

4. That in the act, as charged against S. H. Mixon, the reference to Thomas M. Dean constituted no offense.

The acts charged against S. H. Mixon appear pp. 6–9. He refers to Thomas M. Dean, of Olivia, Ala., p. 7. Dean is not a defendant here, and it is wholly immaterial who Dean was, whether he was a real or fictitious person.

The letter of Samuel H. Mixon of July 16, 1891, in which he refers to Dean, is charged in the indictment as having been deposited in the United States post-office at Mixon, Ala., "still further to effect the object of said conspiracy."

Now, we have already shown by authorities heretofore cited that it was wholly immaterial whether the contents of the letter so mailed were true or false.

5 and 6. Whether the overt act charged to have been committed by E. H. Cook was or was not done in furtherance of the conspiracy, or to effect its object, was matter for the jury and not for the court on a demurrer. For the purposes of this demurrer, it is enough that both as to E. H. Cook and T. B. Brown it is charged that the acts done by them, or in which they were concerned, were acts done in furtherance of the conspiracy.

7. The individual names of the members of the several firms and companies attempted to be defrauded are no more essential or proper to an adequate charge of this offense in an indictment than would be the recital of the places and dates of their birth, or the names of their parents. They are not parties to this proceeding in any sense.

II.

That the court erred in allowing W. C. Karns to testify.

Whatever merit there may be or might have been in this objection, if properly presented, it is manifest that it does not appear in this record in such a way as that notice can be taken of it. The questions propounded to the witness and the answers given by him nowhere appear in this record, nor does it appear that any objection was made or exception taken by the defendants to any question propounded to the witness or to any answer given by him.

In the bill of exceptions, page 25, there appears what purports to be a statement of the facts testified to by W. C. Karns. That he was a United States post-office inspector; that complaints had been made about fraudu-

lent letters mailed at Olivia, Ala.; that he had been instructed by the Post-Office Department to investigate the same; that he had entered a postal car in Alabama, made an examination of the mail, found there the letters from the defendants recited in the indictment, put his private mark upon them, and afterwards identified them when they had been delivered.

Now, up to this point no sort of objection appears to have been made to the testimony of this witness. On page 27 it appears that the Government offered to introduce in evidence the envelopes which had been identified by the witness, and the defendants objected to that on the ground that they were not shown to be in the handwriting of the defendants, or either of them; and "that each of said envelopes, with the writing, printing, and indorsements thereon, is incompetent." It is inferable from the record that the contents of the envelopes were also introduced in evidence. If so, the envelopes, etc., were clearly competent as part of the res gestæ of the transaction. It was surely competent to prove any fact tending to show the agreement by defendants to commit the act made an offense and a crime by section 5480, Revised Statutes, or any act to carry such agreement into effect. The evidence of other overt acts was competent upon the question of motive in the commission of overt acts charged in the indictment. It was relevant to the issue to prove that the defendants had opened correspondence by means of the post-office establishment of the United States; and this correspondence could be best proven by the introduction of letters which formed in whole or part that correspondence.

Whether the handwriting on the envelopes was shown to have been that of the defendants, or either of them, does not appear in this record, as it does not purport to contain *all* the evidence that was offered to the jury, but only all "to which any objections and exceptions were taken by the said J. T. Stokes and others" (p. 30).

But whether the addresses on the envelopes were in the handwriting of the defendants, or either of them, or not, is wholly immaterial, if it otherwise appeared in evidence that the letters contained in these envelopes were written or signed by them, or by their authority, or had been mailed by them, or with their knowledge, or by their procurement.

III.

In allowing the order of T. B. Brown to freight agent at Greenville, Ala., to deliver freight to Kirkpatrick, and the paper attached thereto, to be introduced in evidence to the jury.

The statement in the bill of exceptions as to this transaction appears on page 27.

It appears from Brown's testimony that E. H. Cook ordered a box of shoes for him from W. L. Douglass & Co., of Brockton, Mass., and stated to the witness at the time he made the order, "Let's beat them." That soon after the order was made Cook informed witness that the goods were in the warehouse at Greenville, Ala.

There was evidence tending to prove that the witness Brown did give Cook an order on the freight agent at Greenville, Ala., by which order the freight agent was directed to deliver the goods to Mr. Kirkpatrick. A copy

of the order was offered and admitted in evidence, with the bill of lading and local freight waybills, showing the shipment of the goods by Douglass and their consignment to E. H. Cook & Co.

The defendant objected to the introduction of these papers and order, on the ground that they were irrelevant and incompetent, and that the waybills and bills of lading were made by the railroad company and do not tend to show the guilt of the defendants.

As already said, this evidence, like that just above considered, certainly does tend to show acts done by Cook and Brown, who are defendants here in pursuance of the alleged conspiracy, and design to effectuate it.

On page 15 appears the letter from Brown to W. L. Douglass Shoe Company, set out in full in the indictment, with all the allegations appropriate thereto.

This evidence, which is objected to, tends directly to show the fruit of that letter. It tends further to show in the expression used by Brown to Cook, "Let's beat them," a declared and concerted purpose to carry out the conspiracy; and the fact that the waybills and bills of lading were made by the railroad company, is not a more reasonable objection than that the post-marks on the envelopes were made by the Post-Office Department. They, both alike, not only relate directly to the offense charged, but tend well nigh conclusively to support it.

IV.

The court erred in allowing the credit statement, page 28, signed A. J. Kendrick, to go to the jury.

Several letters from A. J. Kendrick to different shoe dealers, soliciting consignments, are set out in the indictment, pages 4–6.

As to this particular "credit statement," it appears, page 28, that several letters, signed by A. J. Kendrick, who is one of the defendants, were admitted by him to have been written and signed by him; and Kendrick was then shown this "credit statement" and answered that he did not write it or have it written.

The grounds of defendant's objection to its admission appear on page 30. They are, that it did not appear that the credit statement was in Kendrick's handwriting, or that he had written the same; and also that the said "credit statement" was irrelevant and incompetent as evidence.

Again, we reply, that this record does not disclose whether there was evidence before the jury on this trial tending to show that Kendrick had written this statement, authorized it to be written, or not. All that does appear is that he denied that he had written it or had it written. Certainly, while Kendrick was on the witness stand testifying, as the record states, in his own behalf, the Government could not prove by him that he had written the statements, but *non constat* that the Government did not prove by subsequent witnesses that Kendrick had written it or caused it to be written, or had procured it to be mailed.

An entire case can rarely, if ever, be proven by a single witness; and it is quite common practice, and altogether within the discretion of the trial judge, to admit an instrument in evidence subject to a condition that its authenticity will be subsequently proven; and for the fulfillment

of such condition the courts rely upon the assurance of counsel. That it was relevant to the issue, if authentic, there can be no reasonable doubt.

V.

In allowing the district attorney to say in his argument to the jury that they could in their retirement compare the handwriting of the admitted letters with the handwriting of the disputed credit statement, and say whether one man had not written both, was merely calling their attention to an element of intrinsic proof to confirm the force of the extrinsic proof, which had doubtless been laid before them, tending to showing that Kendricks had either written this statement, or caused it to be written, or caused it to be mailed.

The remaining grounds assigned as error do not claim any consideration here.

Whatever of obscurity marks the presentation of this case in the record is owing to the fact that the plaintiffs in error have chosen not to lay before this court all the evidence which was adduced upon the trial in the court below, but have brought up before this court of review only so much of said evidence "that was offered during the trial to which any objections and exceptions were taken by the said J. T. Stokes and others."

If this method of procedure were allowed to prevail, manifest injustice must always be done to the court whose judgment is sought to be reviewed; for it would only be necessary in any case for a plaintiff in error to have certified only such portions of the evidence as, taken alone,

would be clearly inadequate to justify conviction, and rely on a presumption that what does not appear in the record which is laid before the appellate court did not exist in the case which was developed before the trial court.

HOLMES CONRAD,
Solicitor-General.